
CHICAGO BAR
ASSOCIATION

130 ILL.APP.2d 57

52750-53233

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
vs.
JOSEPH P. OLEJNICZAK,
Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. James P. Piragine, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant, Joseph P. Olejniczak, was charged with the offense of contributing to the sexual delinquency of a child. Following a bench trial, the defendant was found guilty and sentenced to two years probation with the first four months to be served in confinement. After a denial of his motion for modification of sentence, the defendant brought this appeal.

A court reporter not being present during the proceedings, the following evidence was stipulated by both trial counsel.

Charles Van Dyke, the arresting officer, testified that he saw the defendant and Vicki Mulhall in the back seat of the defendant's automobile. Miss Mulhall's dress was above her waist and panties and stockings were found on the front seat of the car.

Vicki Mulhall testified that she was sixteen years of age on the night in question and was "necking" with the defendant but did not have sexual intercourse with him.

The defendant testified that he was nineteen years of age on the night in question and was "necking" with and did caress Vicki Mulhall. He denied that he fondled her private parts or that her dress was above her waist. He also stated that she was fully clothed.

Defense counsel later stipulated that the evidence presented was sufficient to sustain a conviction of the offense charged, but noted that the State had introduced no evidence to

show that the defendant's acts had actually contributed to Miss Mulhall's delinquency and further, that the State failed to establish Miss Mulhall's character.

On appeal, the defendant raises four points: (1) the complaint fails to allege an offense cognizable by the law; (2) the State failed to meet its burden of proof; (3) the trial court erred by failing to hold a hearing in mitigation and aggravation; and (4) the sentence imposed by the trial court was arbitrary, excessive and too severe.

The complaint charges the defendant with contributing to the sexual delinquency of a child, in violation of Ill. Rev. Stats. (1965), ch. 38, §11-5, which provides:

> (a) Any person of the age of 14 years and upwards who performs or submits to any of the following acts with any person under the age of 18 contributes to the sexual delinquency of a child:
>
> * * *
>
> (3) Any lewd fondling or touching of either the child or the person done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the person or both;
>
> * * *

The complaint charges that the defendant violated this statute "in that he fondled or touched Vicki Mulhall, age 16, with the intent to either arouse or satisfy the sexual desires of either himself or Vicki Mulhall." Defendant argues that the statute proscribes only lewd fondling or touching and contends that the instant complaint alleges no offense because it does not sufficiently characterize the defendant's act as being lewd or indecent.

While we agree that the statute contemplates only lewd or indecent fondlings or touches performed with requisite intent, we do not agree that the instant complaint is fatally defective.

The function of a complaint is to advise the accused of the nature and cause of the accusation against him so as to enable him fully to prepare his defense and sustain a plea of judgment in bar of any further prosecution for the same offense, People v. Dillon, 93 Ill.App.2d 151, 236 N.E.2d 411 (1968); and a complaint must be sufficiently specific to inform the offender of the accusation against him so that he will be able to prepare his defense and avoid being placed in double jeopardy. People v. DeGroot, 108 Ill.App.2d 1, 247 N.E.2d 177 (1969). The instant complaint sets forth the name of the offense, the statutory provision allegedly violated, the act complained of, the date and location of the offense and the identities of the parties involved. The nature and elements of the offense, though not in the precise language of the statute, are adequately presented. The defendant went to trial represented by counsel and no objection to the complaint was made prior to the time of trial. The defendant has not demonstrated that his defense was in any way impaired nor does he express any fear of being placed in double jeopardy. We believe that the complaint fairly apprised the defendant of the charge against him and if he desired any more definiteness with respect to the complaint, he could have obtained the same by an appropriate motion before the trial. People v. Ostrowski, 402 Ill. 106, 83 N.E.2d 276 (1949); People v. King, 30 Ill.App.2d 264, 174 N.E.2d 213 (1961).

Defendant's second contention is that the evidence does not establish his guilt beyond a reasonable doubt. He argues that the testimony introduced through the State's witnesses lacks the specificity and sufficiency necessary to support the conviction. We do not agree. The evidence clearly established that the defendant and Miss Mulhall were engaged in an amorous undertaking in the rear seat of the defendant's auto. Officer

Van Dyke testified that Miss Mulhall's dress was above her waist and that panties and stockings were found on the front seat of the car. The defendant, though he denied that Miss Mulhall was not fully clothed, testified that he was "necking" with and caressing Miss Mulhall. The obvious inference which may be adduced from this testimony is that the defendant was engaged in conduct proscribed by the criminal statute here involved. Questions as to the credibility and weight of testimony and the inference to be drawn therefrom by the trier of fact are, in a case tried without a jury, best left for resolution by the trial judge, and we will not substitute our judgment for his determinations in this regard unless it appears from the record that there is clearly a reasonable doubt as to the defendant's guilt. People v. Morrison, 23 Ill.2d 201, 177 N.E. 2d 833 (1961); People v. Cardenas, 98 Ill.App.2d 446, 240 N.E. 2d 417 (1968). We find no such doubt in the record before us.

Defendant's third contention is that the trial judge erred by failing to conduct a hearing in mitigation and aggravation. As an alternative prayer for relief, he asks that the cause be remanded for such a hearing.

Chapter 38, Sec. 1-7(g) of the Illinois Revised Statutes (1965) provides:

> (g) Mitigation and Aggravation.
>
> For the purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender and may consider such evidence in aggravation or mitigation of the offense.

On numerous occasions, this court has held that such a hearing is mandatory prior to the imposition of sentence unless expressly and understandingly waived by the defendant; and the burden of showing such a waiver is upon the State. People v. Louis, 112

Ill.App.2d 356, 251 N.E.2d 373 (1969); People v. Walker, 103 Ill. App.2d 308, 243 N.E.2d 674 (1968); People v. Sessions, 95 Ill. App.2d 17, 238 N.E.2d 94 (1968); People v. Smice, 79 Ill.App.2d 348, 223 N.E.2d 548 (1967). Information concerning a defendant's moral character, life, marital status, family, occupation and prior record is essential if the power of a reviewing court under Ill. Rev. Stats. (1969), ch. 110A, §615(b)(4), (to reduce the punishment imposed by the trial court) is to have vitality. We have searched the record and find no evidence that a hearing was held or that the defendant expressly and understandingly waived the hearing. The State's contention that a defendant's failure to request a hearing in mitigation constitutes a waiver thereof is unimpressive. The State relies upon People v. Fuca, 43 Ill. 2d 182, 251 N.E.2d 239 (1969) and People v. Nelson, 41 Ill.2d 364, 243 N.E.2d 225 (1968). The Fuca case, however, concerned relief under the Post-Conviction Hearing Act, and in Nelson the court found that the defendant did, in fact, have a hearing in mitigation and aggravation.

The part of the judgment of the trial court finding the defendant guilty of contributing to the sexual delinquency of a child is affirmed and the cause is remanded with directions to vacate the sentence and to conduct a hearing in mitigation and aggravation, and impose an appropriate sentence. Judgment finding defendant guilty is affirmed and the cause is remanded with directions.

JUDGMENT AFFIRMED IN PART AND
CAUSE REMANDED WITH DIRECTIONS.

MC CORMICK, P.J., and BURKE, J., concur.

130 ILL. APP.2-147

53480

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, vs. HERMAN ASHTON, Defendant-Appellee.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE GLENN T. JOHNSON Presiding

ABST

MR. PRESIDING JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

The defendant, Herman Ashton, was arrested on April 3, 1968. On May 21, 1968, a true bill was returned charging him with robbery and aggravated battery, and he remained in custody until August 27, 1968, when he was discharged pursuant to Ill. Rev. Stat. 1967, ch. 38, §103-5(a). That section provides in part: "Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he was taken into custody unless delay is occasioned by the defendant, . . ." The State has appealed the trial court's order on the ground that the defendant occasioned the delay and was therefore erroneously discharged from custody.

On July 10, the case was continued until August 21, 1968. The defendant argues that because the motion was entered as the court's motion it cannot be attributed to him. At the hearing on July 10, defense counsel presented various discovery motions and the State was given 15 days to respond. When defense counsel then suggested some date in August for trial, the court asked what date and was told the 21st. Counsel suggests that if the prosecutor had any objections he should have raised them then, and that by not objecting he acquiesced to the trial date and implicitly indicated that he was not prepared to go to trial until that date.

We believe that the motion of July 10 was "occasioned" by the defendant although it was technically entered as the court's motion. Defense counsel could have asked for a late July or an early August date and still have been within the 120-day period, but he requested a date some 42 days from the date of the hearing, one which was beyond the 120 days since defendant had been in custody.

In People v. Fosdick, 36 Ill. 2d 524, at 529, the Illinois Supreme Court said:

> "In the varied fact situations that involve the 120-day rule, we have carefully examined the facts to prevent a 'mockery of justice' either by technical evasion of the right to speedy trial by the State, or by a discharge of a defendant by a delay in fact caused by him. People v. Bagato, 27 Ill. 2d 165."

Under the facts in the present case, although the continuance from July 10, 1968 to August 21, 1968, was entered as an order of court, we feel it would be unreasonable to allow the defendant to be discharged since it was his attorney who requested that delay. It would be a "technical evasion" in the sense that although it was entered as the court's motion continuing the case, the fact is that the continuance was occasioned by the defendant and was entered for his benefit. He cannot now complain that the continuance he requested should serve as the basis for his discharge.

The Supreme Court said in People v. Bagato, 27 Ill.2d 165, at 168:

> "As construed by the courts, the right to discharge is not absolute in the sense that mere lapse of time ousts the court of jurisdiction. (People v. Morris, 3 Ill. 2d 437.) Where a defendant himself has sought and obtained a continuance, or by his own actions caused the delay, the right to be tried within the four-months period of incarceration is suspended. . . . At the same time the courts have been vigilant of the rights conferred by that statute, and have protected them from being nullified

> by technical evasions. Thus, even where the record recited that the motion for continuance was made by defendant, the statute would not be tolled where the actual report of proceedings indicated that defendant had not in fact caused or contributed to the delay. People v. House, 10 Ill. 2d 556, 558; People v. Wyatt, 24 Ill. 2d 151, 154."

Our courts apply the "technical evasion" principle to both the People and the defendant. Totally applicable to the case before us is the court's statement in Bagato that it did not place primary concern upon the technical point as to whose motion a continuance was listed. In Bagato the continuance was listed as the defendant's, but the record showed that the defendant had not in fact caused or contributed to the delay. In the present case the motion was phrased as the court's, but the report of proceedings indicates that the defendant caused the delay.

Accordingly, the order is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED
WITH DIRECTIONS.

LYONS, J., and BURKE, J., concur.

69-27

130 I.A.2 211

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

ABST.

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and sixty-nine, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Acting Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable THOMAS J. MORAN, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On AUGUST 31, 1970 the Opinion of the Court on Petition for Rehearing was filed in the Clerk's Office of said Court, in the words and figures following, viz:

NO. 69-27

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HELEN RICKE, Plaintiff-Appellee, vs. CYRIL RICKE, Defendant-Appellant.	)	Appeal from the Circuit Court of DuPage County

OPINION ON PETITION FOR REHEARING

JUSTICE THOMAS J. MORAN DELIVERED THE OPINION OF THE COURT:

The defendant appeals from an order modifying his visitation rights with his minor children.

The plaintiff and defendant were divorced in 1964. The decree granted, in addition to alimony and support, the custody of the five minor children to the plaintiff subject to visitation rights by the defendant. In 1967, by agreement of the parties, the decree was modified by placing custody of the children with the defendant and allowing reasonable visitation rights to the plaintiff. On December 18, 1968, upon plaintiff's motion for a change of visitation rights, the trial court entered the order from which this appeal is taken.

The order provides that "...the plaintiff may visit her children in the home of the defendant" at certain times on specified days. The sole question raised by the defendant is whether or not the trial court could properly order the plaintiff to visit her children in the home of the defendant.

This court filed its opinion herein on June 27, 1969. On July 19, 1969, a petition for rehearing was filed herein and taken under advisement. Thereafter, the court on its own motion recalled its opinion. On December 22, 1969, upon stipulation of the parties, the appeal was dismissed. On April 15, 1970, on motion of the defendant, this court reinstated the appeal as of October 10, 1969. The records of the court disclose that the same parties attempted to appeal from a subsequent order ; that appeal, however, was dismissed by this court for failure to comply with Supreme Court rules. The short record filed in that appeal discloses that on August 22, 1969, the trial court entered an order granting to the plaintiff custody of 3 of the minor children of the parties. This order also provided "...that each of the parties shall have the right to reasonable visitation of the children in the other's custody; that Cyril Ricke may exercise said right in the premises..." where the plaintiff resides "...or away therefrom...".

We are of the opinion that this later order has rendered moot the question before this court.

In LaSalle Nat. Bank v. City of Chicago, 3 Ill. 2d 375, 379 (1954) the Supreme Court stated as follows:

> "...Where the issues involved in the trial court no longer exist, an appellate court will not review a case merely to decide moot or abstract questions, to establish a precedent, or to determine the right to, or the liability for, costs, or, in effect, to render a judgment to guide potential future litigation. (Citations omitted) Since the existence of a real controversy is an essential requisite to appellate jurisdiction, the general rule is that where a reviewing court has notice of facts which show that only moot questions or mere abstract propositions are involved, it will dismiss the appeal or writ of error even though such facts do not appear in the record."

This appeal is hereby dismissed.

APPEAL DISMISSED.

Abrahamson & Seidenfeld, J.J. - Concur

54174

PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. WILLIAM EARNEST HOPE, Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Hon. Joseph A. Power, Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant, represented by the Public Defender, pleaded guilty on March 12, 1968, to two indictments charging the offenses of theft of an automobile. After hearing testimony stipulated to by the prosecutor, defendant and his counsel, the court found defendant guilty and ordered that he be placed on probation, on each of the two indictments, for five years, the first year to be served at Vandalia, the sentences to run concurrently.

The defendant was charged with violation of the conditions of his probation in that he was subsequently convicted of criminal trespass to a vehicle on March 6, 1969, and sentenced to serve one year in the House of Correction. A rule to show cause had been entered to determine why his probation should not be terminated. He was represented by the Public Defender and, based on this criminal trespass conviction, the defendant's probation was terminated and he received sentences on the original two charges of theft of two to five years, to run concurrently but consecutive to the one year sentence for criminal trespass.

On June 23, 1970, the Public Defender, counsel for defendant on appeal, filed in this court a petition for leave to withdraw as appellate counsel pursuant to the rule in Anders v. California, 386 U.S. 738 (1967), and filed a brief in support of

his petition, which alleged the appeal was without merit and could not possibly be successful.

On July 1, 1970, defendant was notified by this court that the Public Defender's motion to withdraw had been allowed. Defendant was sent copies of the petition and the brief in support thereof on June 23, 1970, and was instructed that he had until September 1, 1970, to file any points he might choose in support of his appeal.

On July 4, 1970, the defendant replied by "Special Letter" to this court, alleging that his constitutional rights were violated; that he was convicted for the same crime twice; and that he was never proved guilty.

The Public Defender in his brief states that a review of the transcript of the common law record and the report of proceedings reveals that the only basis for an appeal would be whether the defendant was denied procedural due process of law in his probation violation hearing. We agree.

Where an order admitting a defendant to probation is sought to be terminated, the general procedure required to be followed is set forth in People v. Price, 24 Ill. App.2d 364, 164 N.E.2d 528 (1960), and in later decisions and the provisions under Chapter 38, Section 117-3 of the Illinois Revised Statutes. Such guidelines are: defendant is entitled to a conscientious judicial determination according to accepted and well recognized methods upon the question of whether his probation conditions imposed have been violated; defendant must also be notified of the alleged violations of his probation and must be given full opportunity to refute the charge of alleged violations.

The order of March 12, 1968, admitting defendant to probation provided, among other things, that the defendant would not, during the term of his probation, violate any criminal law of this state. The record discloses, in the instant case, that the defendant was informed of the alleged probation violation,

and was present in court with his appointed counsel when the State presented evidence of his conviction of criminal trespass which occurred subsequent to his having been place on probation. In view of the evidence of defendant's violation of probation, it appears that the trial court adhered to the applicable statute and the guidelines set forth in appellate decisions. We find that the trial court did not abuse its discretion in ordering the termination and sentencing of defendant.

We have examined at length the Public Defender's brief in support of his motion to withdraw and have reviewed all of the proceedings in accordance with the requirements of Anders. We conclude the appeal is without merit, and the judgment of conviction is hereby affirmed.

AFFIRMED.

BURMAN, P.J., and ADESKO, J., concur.

Abstract only.

130 ILL. APP. 2d 259

54195

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,
v.
DONALD HANSEN,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.
Hon. Francis T. Delaney,
Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant, initially represented by the Public Defender, then by private counsel, pleaded guilty to the offenses of armed robbery and carrying and unlawful use of a weapon. After hearing testimony stipulated to by agreement between the prosecutor, defendant and his counsel, the court found defendant guilty and sentenced him to the penitentiary for three to five years on the armed robbery charge, and from three to five years on the unlawful use of weapon charge, the two sentences to run concurrently.

On May 26, 1970, the Public Defender, counsel for defendant on appeal, filed in this court a petition for leave to withdraw as appellate counsel pursuant to the rule in Anders v. California, 386 U.S. 738 (1967), and filed a brief in support of his petition, which alleged the appeal was without merit and could not possibly be successful.

On June 4, 1970, defendant was notified by this court that the Public Defender's motion to withdraw as counsel for defendant had been allowed on June 1, 1970. Defendant was sent copies of the petition and the brief in support thereof and was instructed that he had until August 2, 1970, to file any points he might choose in support of his appeal. Defendant failed to file any such points.

The brief and argument state that the only basis for an appeal rests upon a failure to fully admonish defendant as to the significance and consequences of a change of plea to guilty.

When the case came up for trial on October 31, 1968, the following colloquy took place:

MR. O'ROURKE: May it please the Court, your Honor at this time I have been in consultation with my clients, I have advised them of their constitutional rights, your Honor, and I have been advised by my clients at this time they wish to withdraw their plea of not guilty to Indictment Number 68-2017 and enter a plea of guilty as charged.

* * *

THE COURT: Donald Hansen?

DEFENDANT HANSEN: Yes, sir.

* * *

THE COURT: You have heard Mr. O'Rourke advise me that at this time you are pleading guilty to this indictment in the first count of which charged you with armed robbery, is that correct, sir?

DEFENDANT HANSEN: Yes.

THE COURT: The second count has been nolled; the third count charges you with unlawful use of a weapon, carrying a weapon on your person and also that this occurred within five years of your last release from the penitentiary, is that correct, sir?

DEFENDANT HANSEN: Yes, sir, it is.

THE COURT: Do you know that when you plead guilty to these charges you waive your right to a trial either by me or twelve people in that box?

DEFENDANT HANSEN: Yes, sir, I do.

THE COURT: And knowing and understanding that do you still persist in your guilty plea?

DEFENDANT HANSEN: Yes, I do.

THE COURT: Before accepting your plea, it is my duty to advise you that under your plea of guilty to the first count of this indictment charging you with armed robbery I may sentence you to the Illinois State Penitentiary for any term of years not less than two and for as long as the rest of your natural life, do you understand that, sir?

DEFENDANT HANSEN: Yes, I do.

THE COURT: And knowing and understanding that do you persist in your guilty plea?

DEFENDANT HANSEN: Yes, sir.

THE COURT: -- in this indictment charging you with armed robbery?

DEFENDANT HANSEN: Yes.

THE COURT: On the third count of the indictment: that you knowingly carried a concealed weapon upon your person, previously you had been indicted and convicted on another charge and sentenced and within five years after your release from the penitentiary you were again found with a gun on your person and under that count of the indictment --

MR. SERPICO: -- one to ten, Judge.

THE COURT: -- I may sentence you to the Illinois State Penitentiary -- is it one to ten?

MR. SERPICO: Yes.

THE COURT: -- for any term of years not less than one and for not more than ten years, do you understand that, sir?

DEFENDANT HANSEN: Yes, sir.

MR. SERPICO: This could be consecutive also, Judge.

THE COURT: And in addition thereto there could be consecutive sentences of one to ten on the unlawful use of weapon to run consecutive with the not less than two and for as long as the rest of your natural life on the plea of guilty on the armed robbery, do you understand that, sir?

DEFENDANT HANSEN: Yes, I do.

THE COURT: And knowing and understanding that do you still persist in your guilty plea?

DEFENDANT HANSEN: Yes, sir.

[The court then accepted the guilty plea.]

The point raised in defense counsel's brief is governed by the following:

Chapter 38, § 115-2 of the Criminal Code (Ill. Rev. Stat. 1967):

> (a) Before or during trial a plea of guilty may be accepted when:
>
> (1) The defendant enters a plea of guilty in open court;
>
> (2) The court has informed the defendant of the consequences of his plea and of the maximum penalty provided by law which may be imposed upon acceptance of such plea.

Supreme Court Rule 401 (b) provides:

> (b) Procedure on Plea or Waiver. The court shall not permit a plea of guilty or waiver of indictment or of counsel by any person accused of a crime for which, upon conviction, the punishment may be imprisonment in the penitentiary, unless the court finds from proceedings had in open court at the time

> waiver is sought to be made or plea of guilty entered, or both, as the case may be, that the accused * * * understands the nature of the charge against him, and the consequences thereof if found guilty * * *. The inquiries of the court, and the answers of the accused to determine whether he understands his rights * * * and comprehends the nature of the crime with which he is charged and the punishment thereof fixed by law, shall be taken and transcribed and filed in the case. The transcript, when filed, becomes a part of the common law record in the case.

We agree with the Public Defender that the record establishes that the court's admonition to defendant was adequate and did adhere to the requirements of Supreme Court Rule 401(b) as construed by the Supreme Court in People v. Ballheimer, 37 Ill.2d 24, 26, 224 N.E.2d 811 (1967), and People v. Kontopoulos, 26 Ill.2d 388, 390, 186 N.E.2d 312 (1962).

We have examined at length the Public Defender's brief in support of his motion to withdraw and have reviewed all of the proceedings in accordance with the requirements of Anders. We conclude the appeal is without merit, and the judgment of conviction is hereby affirmed.

AFFIRMED.

BURMAN, P.J., and ADESKO, J., concur.

Abstract only.

54298

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,
vs.
LEROY BROADNAX,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

Hon. Philip Romiti, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant was charged with the offense of robbery in Indictment No. 68-4267 under Chapter 38, Section 18-1 of the Illinois Revised Statutes (1967). He was represented by private counsel and he entered a plea of not guilty. On April 8, 1969, the defendant informed the court that he wished to change his plea of not guilty to guilty as to the offense charged. The trial judge extensively questioned the defendant with regard to changing his plea. The judge then informed the defendant of the penalties which he could impose for the crime charged and the defendant affirmatively acknowledged his understanding. The court informed defendant that the effect of his pleading guilty would mean he would be waiving a trial by jury. Defendant acknowledged that he understood this also. The defendant persisted in his plea of guilty after the trial court's admonishment. The court then entered judgment on the plea and conducted a hearing in aggravation and mitigation. The defendant was sentenced to a term of three to five years in the Illinois State Penitentiary. Defendant filed a notice of appeal and the Public Defender was appointed to represent him.

The Public Defender has filed a motion in this court to withdraw from the case on the ground that after a careful examination of the record he had concluded that an appeal would be wholly frivolous and could not possibly be successful. Pursuant

to Anders v. California, 386 U.S. 738 (1967), the Public Defender has filed a brief in support of the motion in which he concluded that from the examination of the record, the only possible charge of error which could be urged would be the trial court's admonishment of the defendant as to the consequences of his pleading of guilty.

On June 5, 1970, defendant was notified by this court of the Public Defender's motion to withdraw and was sent copies of the petition and the brief in support thereof on May 26, 1970. He was advised that he had until August 7, 1970 to file any points he might choose in support of his appeal. Defendant has failed to file any such points.

We agree with defense counsel that the record establishes beyond question that the court's admonishment was more than adequate and that an appeal upon that point would be frivolous citing Illinois Revised Statutes, Chapter 38, Section 115-2 (1967); Illinois Supreme Court Rule 401(b) (1967); People v. Kontopoulos, 26 Ill.2d 388, 186 N.E.2d 312 (1962).

We have further fully examined the entire record of the proceedings in accordance with the requirements of Anders v. California, 386 U.S. 738 (1967) and People v. Jones, 38 Ill.2d 384, 231 N.E.2d 390 (1967). We conclude that the appeal is wholly frivolous and without merit. The motion of the Public Defender for leave to withdraw is granted and judgment is affirmed.

AFFIRMED.

MC CORMICK, P.J., and BURKE, J., concur.

54864

PETER J. VLAHAKIS, Plaintiff-Appellant, v. ERICK W. KUNTZE, SR., ERICK W. KUNTZE JR., E. W. KUNTZE & SONS CONTRACTORS; COUNTRY ACRES APARTMENTS, as agent for beneficiaries of LA SALLE NATIONAL BANK trust No. 29385 and UNKNOWN OWNERS; KUNTZE BLDG. CORPORATION, Defendants-Appellees.	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY. HONORABLE MARTIN G. LUKEN, PRESIDING.

MR. JUSTICE DRUCKER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order of the trial court striking his amended complaint. The complaint was for breach of contract and damages occasioned by defendants' removal of plaintiff's personal property. The order striking the amended complaint provided:

> This cause coming on to be heard on motion of the defendants to strike the amended complaint, and the court having jurisdiction and upon hearing arguments,
>
> It is hereby ordered
>
> Said complaint be and hereby shall be stricken, and the plaintiff is hereby given 28 days to file an amended complaint, and the defendant is given 28 days thereafter to answer and otherwise plea.

The jurisdiction of this court is limited to appeals from final judgments, except in those cases where appeals from interlocutory orders are permitted by Supreme Court Rule. Constitution of Illinois, Article VI, S 7, 1870, and Supreme Court Rule 307. In Niles v. Szczesny, 13 Ill. 2d 45, 48, the court in defining a final, appealable order stated:

> To be final and appealable, a judgment or order must terminate the litigation between the parties on the merits of the cause, so that, if affirmed, the trial court has only to proceed with the execution of the judgment.

In Schoen v. Caterpillar Tractor Co., 77 Ill. App. 2d 315, 317, the court in discussing the need of a final, appealable order said:

> The obvious purpose therefore is to prevent a multiplicity of suits and piecemeal appeals. Consequently, those trial orders dismissing or striking complaints, which if affirmed, might result in the filing by the plaintiff of a new suit or amended complaint arising from the same transaction, are found not to be final and appealable because they have not terminated the litigation between the parties.

See also Doner v. Phoenix Land Bank, 381 Ill. 106.

We find that the order striking plaintiff's amended complaint is not a final, appealable order and we are therefore without jurisdiction to determine the appeal, despite the fact that neither party has called attention to our lack of authority. County of Cook v. Hoytt, 41 Ill. App. 2d 122, 124.

APPEAL DISMISSED.

Stamos, P.J., and English, J., concur.

(Abstract)

53734

130ILLAPP2d394

ABST

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

WILLIE BOOKER,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

HON. JAMES J. MEJDA, JUDGE PRESIDING

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant, Willie Booker, was indicted on the charge of committing the offense of deviate sexual assault. Upon a waiver of a jury trial, the defendant was found guilty by the trial judge in the manner and form as charged. After a hearing on aggravation and mitigation, the defendant was sentenced to a term of not less than 4 years nor more than 8 years imprisonment in the penitentiary.

The sole contention, on appeal, is that the sentence was too severe. It is argued that the defendant who was 25 years old and the stepfather of five children, who was never convicted of any previous offense, is gainfully employed and should have been granted probation.

The statutory penalty for devaite sexual assault is imprisonment for not less than 4 years nor more than 14 years. Ill. Rev. Stat. Ch. 38 §11-3. It is clear that the court gave the defendant the minimum sentence permitted by law after conducting a hearing in mitigation and aggravation.

The defendant points out that in lieu of a sentence in the penitentiary, we have the power to grant probation and cites People v. Evrard, 55 Ill. App. 2d 270, 204 N.E.2d 777. In that case, the Appellate Court reversed and remanded the defendant's sentence of one to three years upon a conviction on a charge of indecent liberties with a girl 15 years of age. The Appellate Court directed the trial court to hear and receive evidence as to the defendant's moral character, life, family, occupation and criminal record as provided under the statute. The Court

expressed its view that it may well be that the evidence might show that a carefully supervised period of probation more likely would result in rehabilitation than a term in the penitentiary. The evidence there showed that the defendant had been drinking heavily and at the trial admitted having intercourse with the girl and the testimony indicated remorse and contrition which was reflected by a statement of the trial judge to the effect that the crime was unfortunate, but not wilful or premeditated. In other cases cited by the defendant, the reviewing courts reduced excessive minimum sentences, a condition not present here.

The evidence in the case at bar reveals that a female of 55 years went alone to her landlady's apartment in the early morning of February 1, 1968, when a man who she identified in court as the defendant forced his way in the apartment right behind her. She tried to run, but he grabbed her about the neck, dragged her through an alley and forced her to commit devious sexual acts. He threatened to kill her if she called the police. Subsequently, she called the police. She testified that she had seen the defendant many times before the attack and knew him by his first name. The landlady testified that she heard someone trying to get in the apartment through the back door so she called the complaining witness and when she came down she opened the front door and they tried to keep the man in back of her from getting in. She ran out of the front door and the complaining witness ran out the back way with the man following her. When she next saw the complainant she noticed that her clothes were muddy, her hair mussed up, her lip was swollen and she was bleeding from bruises on her leg. The complainant cried as she told her about being attacked. The complainant's daughter testified that she saw her mother when she came back in the landlady's apartment as shown above and her mother described how Willie attacked her.

The defendant took the stand in his own behalf and denied that he had seen the complaining witness on the day in question and denied attacking her. He admitted that previously he had been in the complainant's house on several occasions in the company of her son.

It is clear that the circumstances that appeared in the Evrard case are not at all similar to the factual situation in the instant case. Here the defendant denied committing the attack and the court found him guilty on the evidence. The Court properly took in account the circumstances surrounding the heinous brutal attack and the potential for rehabilitation. A reviewing court should not disturb a sentence unless it clearly appears that the penalty constitutes a substantial departure from fundamental law and its spirit and purpose or that it manifestly exceeds the proscriptions of Section II of Article II of the Illinois Constitution which requires that penalties shall be proportioned to the nature of the offense. The power in reviewing courts to reduce sentences should be exercised with considerable caution. People v. Taylor, 33 Ill. 2d 417. The trial court had a superior opportunity in the course of the trial and at the hearing in aggravation and mitigation to make a sound determination concerning the punishment to be imposed than we do.

Under the circumstances we find no merit to the defendant's request which would warrant us to reduce the sentence. Accordingly, the judgment of conviction and sentence is affirmed.

JUDGMENT AFFIRMED.

MURPHY AND ADESKO, JJ.,
CONCUR.
(Abstract only)

130 I.A.2 987

No. 69-81

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. WILLIAM EUGENE WOOFF, Defendant-Appellant.	Appeal from the Circuit Court of Madison County, Illinois. Honorable Joseph J. Barr, Judge Presiding.

EBERSPACHER, J.

The defendant, William Eugene Wooff, was convicted, by jury verdict, of burglary with intent to commit theft in violation of Ch. 38, § 19-1, Ill. Rev. Stat. 1967. A motion for new trial was denied, and defendant was sentenced to an indeterminate term of 1 to 8 years in the state penitentiary. Defendant seeks to reverse the lower court's denial of his motion for new trial.

The State's evidence was adduced solely from the testimony of the victim of the burglary, Loyd Ray Shaw. Shaw testified that on the evening of November 30, 1968, he returned from work to his home in Alton. He parked his car in the driveway and entered his home through the front door, which he had secured that morning. He noticed the window in the front door was broken out. As he entered he met the defendant face to face coming from the bedroom in the entry hall. Shaw stated that defendant did not have permission to be in the house at that time. The defendant was carrying a camp stove in his left hand and an unloaded pistol was in his belt; both items belonging to Shaw. Shaw testified defendant took the pistol from his belt and as he did so, Shaw grabbed the barrel and took the pistol from him. Shaw then ordered defendant to lie down which he did and Shaw proceeded to use his own belt to tie defendant's hands behind him as he lay face down on the floor. Shaw then shouted to someone on the street in front of his home to call the police.

Shaw testified the glass from the broken window was scattered over the entry hall which was approximately 4 or 5 feet square. Also, all the lights in the home had been turned on. The pistol was kept in the bedroom between the mattress and the box springs. The bedroom was "torn up" and a half bottle of beer was tipped over in the bedroom and in addition Shaw found a half empty pint bottle of wine in the back room; neither of which were there when Shaw left the house in the morning. The defendant made no other statement at the time of the incident other than, "you might as well go ahead and shoot". He further testified that in his opinion defendant was drunk at the time he accosted him.

Complainant and defendant were acquaintances, had on numerous occasions drunk together, and defendant had on previous occasions been hired by Shaw to help make repairs to Shaw's house, but did not have permission to enter Shaw's locked house on the date of this occurrence.

Defendant took the stand in his own defense and denied remembering the incident. He testified he had been drinking at several bars steadily from sometime before noon on the day in question. He stated that sometime in the late afternoon he lost track of the time and remembered nothing from that point on until waking up in jail the following day.

The following assignments of error are made on this appeal:

(1) that there is insufficient evidence to show an intention on the part of defendant to commit a theft on the premises at the time he made his entry therein.

(2) that no instruction was given on the crime of "theft".

(3) that the forms of verdict given to the jury were improper where the "not guilty" form was not the exact converse of the "guilty" form.

(4) that the State's Attorney"s final argument was so improper and incoherent as to cause fatal prejudice.

(5) that the appointed defense counsel's conduct of the trial was so inept as to amount to no representation at all.

It is clear from the record of trial that there was sufficient evidence from

which the jury could find an intent on the part of defendant to commit a theft in the Shaw residence at the time of his entry therein. The evidence is circumstantial but this is not of itself crippling because "circumstantial evidence is legal evidence, and where it is of so strong and convincing a character as to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, it is the duty of the jury to act upon it and find the defendant guilty, and such verdict must be sustained". People v. Wilson, 387 Ill. 563, 567 (1944), 56 N.E. 2d 630, 632. The intent to commit theft may be inferred from the evidence and it is within the province of the jury to consider all the facts and circumstances in determining the question of intent.

> "Intent to commit burglary can be inferred from the facts and circumstances proved in the case. . . . . Burglary can seldom be proved by direct evidence of the actual breaking and entry, and the inference of guilt in most cases must necessarily be drawn from other facts satisfactorily proved." People v. Geisler, 348 Ill. 510, 516 (1932), 181 N.E. 328, 330.

Defendant's testimony, taken together with Shaw's opinion that defendant was drunk, did not compel the jury to find that he was so drunk that he had no intent. The circumstantial evidence is not consistent with defendant's innocence. The use of the word "intent" in our Criminal Code is limited to conscious objective or purpose to accomplish a desired result. See Committee Comments, Ch. 38, § 4-3, Ill. Anno. Stat. and § 4-4 Criminal Code of 1961. The testimony of Shaw, whose credibility was for the jury to determine, adduced evidence of a forcible, unauthorized entry of his residence. Parts of the residence was ransacked, and the defendant was discovered inside with property of the victim in his hands. We feel this is sufficient evidence of burglary.

Defendant complains that although the People gave an instruction on burglary without objection and defendant also gave an instruction defining the elements of that crime which must be proved beyond a reasonable doubt, there was no instruction given to define the crime of theft. Defendant did not tender such instruction, and raised no objection to any instructions or the absence of such instruction in his post trial motion. As a result any error with reference to instructions was waived.

See People vs. Kelly, 105 Ill. App. 2d 481, 485. While Illinois Pattern Jury Instructions Criminal contains issue instructions on special types of theft (By Unauthorized Control, By Deception, By Threat, etc.) there is no issue instruction or definition instruction on theft generally, and the burglary instruction as well as the issue instruction on burglary found therein do not include the elements or issues of the crime of theft. In The People v. Reed, 33 Ill. 2d 535, 213 N.E. 2d 275, it was contended that the meaning of the word "theft" used in the burglary statute was so complex and hypertechnical as to render that statute unconstitutionally vague and indefinite. The Court felt that the word "theft" as there used was not so difficult of comprehension that it could not be reasonably understood by persons of ordinary intelligence without further definition. The appeal to the Supreme Court of the United States was dismissed for want of substantial federal question. 87 S. Ct. 68, 385 U. S. 10, 17 L. Ed. 2d 9. As a result we cannot say that defendant's trial counsel displayed any lack of competency by failure to make objections to the instructions given, or by failing to raise that issue in the post trial motion.

The following forms of verdict were given to the jury:

"We, the jury, find the defendant, William Eugene Wooff, Guilty of Burglary" and "We, the jury, find the defendant, William Eugene Wooff, Not Guilty".

The Illinois Supreme Court has held that:

> "The test in determining the sufficiency of a verdict and the judgment of conviction based thereon is whether or not the intention of the jury can be ascertained with reasonable certainty. Verdicts are to be liberally construed and all reasonable intendments indulged in their support. A verdict is not to be held insufficient unless from necessity there is doubt as to its meaning; . . . . . ." People v. Bailey, 391 Ill. 149, 152-3, 62 N.E. 2d 796, 798.

Defendant claims error in that the two forms are not the exact converse. We find no error here. In People v. Frenchwood, 27 Ill. 2d 412, 189 N.E. 2d 328, the Court found no error in instructions which required the jury to return a "verdict of guilty of robbery while armed with a dangerous weapon" or a "verdict of not guilty".

The claimed error arising from remarks of the State's Attorney in his closing argument were waived for lack of objection, People v. Donald, 29 Ill. 2d 283 (1963),

194 N.E. 2d 227, they were not of such nature as to require a new trial in the absence of objection.

Defense counsel's representation was not of such low caliber as to be incompetent. The record of this trial when reviewed as a whole shows adequate representation. Counsel's instructions were adequate on the law, his examination and cross-examination of the witnesses shows a knowledge of the case and an honest effort to establish a defense of drunkenness such as to render defendant incapable of forming the requisite intent. We cannot predict what the police who took defendant into custody would have testified had they been called to testify as to defendant's intoxication. Whether or not another counsel with the benefit of hindsight would have tried the case in exactly the same manner is not the test. Review of appointed counsel's competence does not extend to those areas involving the exercise of judgment, discretion or trial tactics and this is true even though appellant, appellate counsel or the reviewing Court might have proceeded in a different manner. People v. Martin, #41435 (Nov. 1969), ___ Ill. 2d _____, _____ N.E. 2d _____; People v. Wesley, 30 Ill. 2d 131, 136, 195 N.E. 2d 708, 711.

We commend appointed counsel for his presentation of the issues. We find no substantial error and the judgment of the trial court is affirmed.

Judgment Affirmed.

CONCUR: /S/ George J. Moran

CONCUR: /S/ Joseph H. Goldenhersh

PUBLISH ABSTRACT ONLY

52333

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ARTHUR STATEN, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Edward J. Egan, Presiding.

MR. JUSTICE ADESKO DELIVERED THE OPINION OF THE COURT:

Defendant, Arthur Staten was indicted for the unlawful possession of a narcotic drug. In a bench trial at which a police officer and the defendant were the only witnesses, the defendant was found guilty and sentenced to the Illinois State Penitentiary for two to five years. Defendant appeals his conviction on the ground that the State failed to prove him guilty beyond a reasonable doubt.

The evidence indicates that on August 12, 1966, Officer Lemon Works and two other officers were effecting an arrest and search at 371 W. 56th Street, Chicago, Illinois, at about 10:25 p.m. They had an arrest warrant for James DeWalt and a search warrant for the first floor rear apartment at that address. Officer Works testified that as he stood in the doorway of the apartment on the first floor landing during the search, he observed the defendant, Arthur Staten, enter the building and start to come up the stairs. According to Works, when the defendant looked up and saw him on the landing, he (Staten) dropped a small silver object from his right hand onto the stairs. The officer further testified that as he was within ten feet of the defendant the object was dropped, he immediately picked it up, found it to be a small package containing white powder and thereupon placed the defendant under arrest. At the trial it was stipulated that the white powder was heroin.

Defendant, Arthur Staten's, version of the incident is that as he ascended the stairs, Officer Works stepped out from a concealed position on the first floor landing, stopped him and searched him, but found nothing. Then the officer brought him back down to the first floor where he was forced to lower his pants for a visual inspection. Again the officer found nothing. Then he was told by Officer Works to lift his pants and wait there, which he did. While he waited, Officer Works "disappeared from view" only to return in thirty seconds with a silver packet in his hand which he claimed the defendant had dropped on the stairs. At the conclusion of the trial, the judge stated, "I believe the officer. I don't believe the defendant. There will be a finding of guilty."

Where a cause is tried without a jury it is the function of the trial court to determine the credibility of the witnesses and the weight to be afforded their testimony. People v. Turner, 108 Ill. App. 2d 132, 246 N.E. 2d 817 (1969). The trial court believed Officer Works' testimony that he saw the defendant rather than defendant's testimony that the officer disappeared from view and returned thirty seconds later with a silver packet which he claimed defendant had dropped. It is well settled that where the evidence is merely conflicting a reviewing court will not substitute its judgment for that of the trier of fact. People v. Clark, 30 Ill. 2d 216, 219, 195 N.E. 2d 631 (1964). We find it neither our duty nor our right to substitute our judgment as to the credibility of the witnesses for that of the trier of fact who heard the evidence presented and observed the demeanor of the witnesses.

We also find that the testimony of Officer Works alone, even though contradicted by the accused, is sufficient to convict. "The testimony of even one witness, if positive and credible, is sufficient to convict in a criminal prosecution in this State even though it is contradicted by the accused." People v. Novotny, 41 Ill. 2d 401, 411, 244 N.E. 2d 182, 188 (1968). In Novotny, a deputy's testimony that his badge was taken, corroborated by another officer's finding the badge on the street, despite contrary testimony by the defendant and four witnesses on his behalf, was sufficient to convict. In People v. Hardaway, 108 Ill. App. 2d 325, 247 N.E. 2d 626 (1969), the complaining witness's testimony that the defendant grabbed him, threw him against an auto and knocked him down despite defendant's version of the incident as accidental was held sufficient to convict. In the case before us we find that Officer Works' positive and credible testimony corroborated by the silver packet of heroin, despite defendant's contrary testimony, is sufficient to convict. We believe it is of no consequence that Officer Works did not summon another officer to watch the defendant while he retrieved the dropped packet. Nor does it matter that fingerprints were not admitted into evidence since the arresting officer saw the defendant in possession of the heroin. People v. Jackson, 23 Ill. 2d 360, 178 N.E. 2d 320 (1961) is distinguishable since in that case no narcotics were found on the defendant; fingerprints were the only link to narcotics found in an open area.

After examining the entire record we believe that the State met its burden of proof and that the defendant was proven guilty beyond a reasonable doubt. The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED

BURMAN, P.J., and MURPHY, J., concur.
(Abstract Only)

130 ILL.APP.2 1071

53158

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ROBERT E. LEE and JOUSMA, INC., Defendants-Appellants.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. James P. Piragine, Presiding.

MR. JUSTICE GOLDBERG DELIVERED THE OPINION OF THE COURT:

Defendants were charged with driving an overloaded vehicle on the highway (Sec. 228 of Uniform Traffic Act; Ill.Rev.Stats. 1969, C. 95-1/2, Sec. 228). At a bench trial, both were found guilty and fined $985.00. Defendants raise no issue on the sufficiency of the evidence or the violation.

The only points raised by defendants revolve around a totally different portion of the statute; namely, Sec. 229(a). As then in force (1967, 1968), this section provided (Ill.Rev.Stats. 1967, C. 95-1/2, Sec. 229(a)):

> "Any police officer having reason to believe that the weight of a vehicle and load is unlawful shall require the driver to stop and submit to a weighing of the same either by means of a portable or stationary scales. If such scales are not available at the place where such vehicle is stopped, the police officer shall require that such vehicle be driven to the nearest public scales."

As appears from the agreed statement of facts (Supreme Court Rule 323(d)), the arresting officer testified that he took the vehicle approximately one-half mile from the place of arrest to a scale to be weighed. It was found that this scale was inadequate. The officer then directed the driver to another scale approximately four miles from the place of arrest.

There was another public weighing station located approximately one mile from where the officer stopped the vehicle. However, when the officer last visited this station, its authorization from the Department of Agriculture had expired. The officer did not know of the existence of another weighing station, apparently operated by the corporate defendant itself, and located one-half mile from the place of the arrest.

Defendants contend that the provisions of Section 229(a) are mandatory so that it was required and essential that the arresting officer take the truck "to the nearest public scales". Defendants contend that the trial court erred in permitting the officer to testify that he did not know of the existence of one of the two public scales and that the Illinois Department of Agriculture sticker on the other closer scale had expired prior to the arrest.

In the opinion of this court, the gravamen or gist of the offense for which defendants were fined appears in Section 228. The simple issues are only the overweight of the vehicle and its use upon the public highway. Section 229(a) merely sets out a standard of conduct or procedure for the arresting officer but these provisions have no bearing upon the guilt of the defendants. See People v. Cannon, 46 Ill.2d 319. In other words, the provisions of Section 229(a), upon which defendants rely, are entirely independent from the remaining provisions of the statute. The fine was not assessed against defendants because of the provisions of Section 229(a) but because of their violation of Section 228.

Defendants cite no authority that the provisions of Section 229(a) are in some manner interconnected with or dependent upon the provisions of Section 228 upon which the complaint against them is based. See Moore v. Jewel Tea Co., 46 Ill.2d 288, 294. Our search discloses that no such authority exists. On the contrary, Section 229(a) seems completely independent from Section 228. There is an additional provision in Section 229 providing penalties for a driver who refuses to follow the orders of an arresting officer (Section 229(c)). We hold that Section 228 is a separate and independent section of the Uniform Traffic Act and this alleged violation of Section 229(a) by the arresting officer constitutes no legal defense. It follows that the contentions of defendants must be rejected and the judgment of the Circuit Court of Cook County accordingly affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., and LYONS, J. concur.

53211

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

SAM TRUMAN,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

Thomas R. McMillen, J.

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

In November 1966 the defendant, Sam Truman, pleaded guilty to robbery and was placed on probation for two and one-half years with the first six months to be spent at the Illinois State Farm at Vandalia. In June 1967, he was convicted of theft and was again sentenced to Vandalia—this time for one year. Proceedings for violation of probation were instituted and in January 1968 the trial court found that Truman had violated his probation and sentenced him on the original robbery charge of one to three years in the penitentiary. The penalty imposed was to be served concurrently with the one-year Vandalia sentence.

The defendant makes only one contention on appeal. He argues that his June 1967 conviction for theft was void because he was not afforded the assistance of counsel at the trial and that the conviction could not be used to revoke his probation. The report of proceedings, however, indicates the contrary. The record shows that the public defender entered his appearance for Truman and a co-defendant named Lawrence Boutwell and represented them at the trial. The following colloquy took place when the case was called for trial:

The Clerk: "Sam Truman, Lawrence Boutwell.

Assistant State's Attorney: The Public Defender on this?

The Court: Yes. Have you talked to him?

Assistant Public Defender: Yes.

Assistant State's Attorney: The State is willing to reduce the charge. We'll recommend a year. Did you ask Mr. Truman if he wants to take a year or go to the Grand Jury?

Truman: I'll take a year here.

The Court: He'll take a year.

Assistant Public Defender: Yes."

The court was informed that Truman had been recently released from Vandalia and, at Truman's request, sentenced him to a year in Vandalia instead of the House of Correction. Boutwell was sent to the House of Correction.

The appointment of the public defendor was acknowledged by the response of the court to the assistant State's attorney's inquiry at the outset of the hearing. The assistant public defender answered affirmatively the court's question whether he had discussed the case with Truman. He also confirmed Truman's statement that he wished to plead guilty in exchange for a one-year sentence. The report of proceedings clearly shows the appointment, the presence and the active assistance of the assistant public defender at the defendant's trial. The order terminating the defendant's probation and sentencing him to one to three years in the penitentiary is affirmed.

Affirmed.

Schwartz and McNamara, JJ., concur.